ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION I

CACR05-1283

June 28, 2006

WENDELL SHIELDS
APPELLANT

AN APPEAL FROM MISSISSIPPI COUNTY CIRCUIT COURT
[CR05-152 and CR01-122]

V.

HON. RALPH WILSON, JR., JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED; MOTION TO WITHDRAW IS GRANTED

At a bench trial on August 30, 2005, the Mississippi County Circuit Court found Wendell Shields guilty of burglary and sentenced him to thirty years in the Arkansas Department of Correction. The court also revoked appellant's probation in a previous case and sentenced him to eight years, to be served concurrently with the thirty years for the burglary charge. His attorney has filed a motion to withdraw as appellant's counsel. The motion was accompanied by a no-merit brief, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Ark. Sup. Ct. R. 4-3(j) (2005), wherein counsel contends that all rulings adverse to his client are abstracted and discussed. Appellant was provided a copy of this brief and was notified of his right to file *pro se* points for reversal, and he has filed a number of *pro se* points. After reviewing the record, we agree with counsel that an appeal in this case would be wholly without merit. Accordingly, we affirm appellant's conviction and probation revocation and grant counsel's motion to withdraw.

On July 21, 2000, appellant pled guilty to theft (case no. 2000-172), and received

sixty months' suspended imposition of sentence. On May 15, 2001, he pled guilty to theft by receiving (case no. 2001-122), for which he received sixty months' probation. On March 7, 2002, appellant pled guilty to felon in possession of a firearm (case no. 2001-400), and was sentenced to thirty months in the Arkansas Department of Correction, followed by thirty-six months suspended imposition of sentence. On June 8, 2005, the State filed a criminal information in the current case, charging appellant with residential burglary. That same day, the State filed a petition to revoke appellant's probation. A bench trial was held August 30, 2005. Prior to trial, appellant moved that the petition to revoke be dismissed regarding case no. 2000-172, arguing that the court did not have jurisdiction to impose a sentence under that case. The court granted his motion.

At trial, Joseph Petty testified that he lived at 1044 Willow on May 18, 2005. He stated that he returned to his apartment at 4:30 p.m. that day and noticed a car running in one of the parking spaces. He stated that a man opened a screen door of his neighbor's apartment and appeared to be leaving, he later identified the man as appellant. Petty entered his apartment and told his wife that there was a black man in his neighbor's apartment. He asked her if someone was working in the apartment, to which she replied that the neighbors were at work. Petty then stated that he left his apartment and stood by his car. Appellant came from the front door of the neighbor's apartment and asked if there were any vacancies. Petty told him that he should ask the people in the apartment he just left, to which appellant denied being in the apartment. Petty's wife then came out of her apartment, and Petty told her to call 911. Appellant started begging him not to call the police, stating that he had warrants. Petty then went to the back of the automobile that he saw earlier and took down the license plate number. Petty testified that the car was running when he originally pulled into his apartment but that it had been turned off. Appellant then got in the car and left.

On cross-examination, Petty testified that when he saw the man in his neighbor's doorway, he recognized the person as not his neighbor. He noted that he and his wife were the only black people living in the area; so, appellant seemed out of place. He also stated that the car was running when he initially pulled up in his apartment, but that when he came back out, the car was moved two parking spaces.

Jessica Ricketts testified that she lived next to Petty. She stated that she received a call from the police, and she went home. When she arrived, she noticed that the casing of her window was taken out and the door opened. She testified that the door was not left open when she left for work. She stated that the pantry door was open in her kitchen, items had been taken out of her bedroom closets, her suitcase had been opened, and her fire safety box was sitting in the kitchen floor. To her knowledge, nothing was missing.

Steve Caudell of the Blytheville Police Department testified that he was given a description of the automobile and the license number. He identified Ricky Shields, appellant's father, as the owner of the vehicle. Appellant came to the police department the next day to make a statement. When asked if he knew anything about the burglary, appellant told Caudell that he was at the apartments that day to see if he could rent an apartment. Appellant also told Caudell that he was driving his father's automobile.

At the close of the State's case, appellant moved for a directed verdict, arguing that the State presented no evidence that appellant entered the apartment with the intent to commit an offense punishable by imprisonment and that, at most, the State's evidence showed that he committed misdemeanor criminal trespass. The court denied the motion.

Ricky Shields testified that he took appellant to the police station. He stated that appellant was looking for an apartment for the two of them and that appellant was using his car. Shields stated that he did not send appellant to any specific apartments. Later in his

testimony, he stated that his liability insurance on his automobile was current on May 18, 2005, but that he told appellant that it was not.

Appellant testified that he was looking for an apartment to rent on May 18, 2005. He stated that his car was still running because he planned to take the number and leave. As he was leaving, he approached Petty and asked him if he knew where the owner of the apartments was. He stated that the only reason he left the apartment was because he did not know that his father had insurance, and he did not want the car to be towed. He stated that he went to the police the next day to tell them that he had nothing to do with a robbery. Appellant stated that he did not move his car at any time and that the only time he moved his car was to go home. He did not see any damage to Ricketts's apartment while he was there. Appellant testified that he left the apartment because Petty stated that he was calling the police and that he knew the police were going to arrest him because of his criminal background.

On cross-examination, he testified that Petty was wrong when he testified that he saw him (appellant) stick his head out of the apartment. He stated that he did not enter the apartment at all. He also stated that his grandmother heard on the police scanner that the police had run his father's tags, and that was why he went to the police station the following day.

After the close of evidence, the court found appellant guilty of residential burglary. It noted that Petty's testimony placed appellant inside Ricketts's residence; that Petty's testimony that appellant told him not to call the police was evidence of appellant's guilt; and that Ricketts's testimony about the condition of her apartment was circumstantial evidence of the purpose to commit a theft. The court also revoked appellant's probation based on the guilty finding. It sentenced appellant to thirty years in the Arkansas Department of

Correction for the burglary and eight years for the probation revocation, to be served concurrently.

An attorney's request to withdraw from appellate representation based upon a meritless appeal must be accompanied by a brief that contains a list of all rulings adverse to his client that were made on any objection, motion, or request made by either party. *Eads v. State*, 74 Ark. App. 363, 47 S.W.3d 918 (2001). The argument section of the brief must contain an explanation of why each adverse ruling is not a meritorious ground for reversal. *Id.* This court is bound to perform a full examination of the proceedings as a whole to decide if an appeal would be wholly frivolous. *Campbell v. State*, 74 Ark. App. 277, 47 S.W.3d 915 (2001). If counsel fails to address all possible grounds for reversal, we can deny the motion to withdraw and order rebriefing. *Sweeney v. State*, 69 Ark. App. 7, 9 S.W.3d 529 (2000).

Counsel argues that an appeal on his motion for directed verdict would be without merit. In a motion for directed verdict, we review the evidence in the light most favorable to the State. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* Only evidence supporting the verdict will be considered. *Id.* Circumstantial evidence provides the basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Holt v. State*, 85 Ark. App. 308, 151 S.W.3d 1 (2004). Whether the evidence does so is a question for the jury. *Id.* A person commits residential burglary if he enters a residential occupiable structure of another person with the purpose of committing any offense punishable by imprisonment. Ark. Code Ann. § 5-39-201(a)(1)

(Repl. 2006).

In arguing that an appeal on this point would be without merit, counsel for appellant relies on *Forgy v. State*, 302 Ark. 435, 790 S.W.2d 173 (1990), and *Oliver v. State*, 14 Ark. App. 240, 687 S.W.2d 850 (1985), *rev'd on other grounds*, 286 Ark. 198, 691 S.W.2d 842 (1985). In *Forgy*, the evidence that supported the residential burglary conviction included testimony that a patio door had been opened and another door forced open, both doors being closed when the residents left; the cabinet doors were open; and fresh scrape marks were present on the cabinet next to the television set. The supreme court held that the State presented sufficient circumstantial evidence for a jury to find that the appellant had entered the home, found the television set, and started to remove the television before the residents thwarted the theft attempt. In *Oliver*, we held that the State presented sufficient evidence that the appellant intended to commit an act punishable by imprisonment when the evidence included testimony that the appellant fled after he was seen climbing out of a window; drawers and file cabinets had been opened and their contents scattered across the floor; windows had been broken; and wires to the alarm system had been cut.

Here, Petty's testimony placed appellant inside Ricketts's apartment, while Ricketts's testimony showed appellant's intent to commit a theft. As argued by counsel, an appeal from the directed-verdict motion would be wholly without merit. In a separate heading, counsel also argues that an appeal from the probation revocation would also be without merit. While counsel explains this point, it is enough to say that the evidence supporting the burglary conviction is also sufficient to support the probation revocation.

At trial, appellant argued that he was not on probation. However, the judgment and commitment order for case No. 2001-122, filed May 15, 2001, shows that appellant received five years' probation. Trial in this case was held on August 30, 2005, within appellant's

probation period. Counsel also discussed the sentences received on both the burglary and the revocation, noting that both are within the statutory ranges.

The only other adverse ruling in the record was the State's objection to the introduction of hearsay testimony. When counsel asked Ricky Shields, "Had you sent [appellant] on some type of mission for you?" the State objected on the grounds of hearsay. The court asked counsel to rephrase, and Shields eventually testified that he and appellant were apartment hunting. Counsel notes that the information sought was obtained by further questions. No meritorious argument for reversal could be made on that point.

Appellant has filed a number of *pro se* points. First, he argues that he was not on probation; however, as already explained, he was on probation for his 2001 guilty plea. He states that he was no longer on probation after he served his thirty months on the 2002 possession of a firearm charge; however, nothing in the record reflects that the 2001 probation was previously revoked or otherwise set aside. He also argues that he should not have received an eight-year sentence when he was only sentenced to five years' probation; however, once a court revokes a probation, it may impose any sentence that could have been imposed in the original order. *See* Ark. Code Ann. § 5-4-303(d)(5) (Repl. 2006). As appellant's probation was revoked on a class C felony, he could have originally been sentenced to serve up to ten years in the Arkansas Department of Correction. *See* Ark. Code Ann. § 5-4-401(a)(4) (Repl. 2006). Accordingly, the trial court was within its authority to sentence appellant to eight years imprisonment after revoking his probation.

Next, while couched in terms of a hearsay objection, appellant argues that the trial court should not have believed Petty's testimony. However, as the State correctly notes in its brief, it is the province of the factfinder to determine the weight of the evidence and the credibility of witnesses. *See Johnson v. State*, 337 Ark.196, 987 S.W.2d 694 (1999).

Finally, appellant argues that he was not a habitual offender. This argument was not raised below; therefore, it is not preserved for appellate review. *See Jones v. State*, 83 Ark. App. 195, 119 S.W.3d 70 (2003) (holding that, even though the appellant was incorrectly sentenced as a habitual offender, the argument was not preserved for appellate review because there had been no objection to the proof of his habitual-offender status during his sentencing). Had the objection been properly preserved, appellant's argument would be without merit, as the State introduced the judgment and commitment orders from appellant's three previous convictions. Appellant was properly sentenced under Ark. Code Ann. § 5-4-501 (Repl. 2006).

A review of the record shows no other adverse rulings. Counsel's brief demonstrates than an appeal in this case would be wholly without merit. Accordingly, we affirm appellant's conviction and revocation and grant counsel's motion to withdraw.

Affirmed; motion to withdraw granted.

PITTMAN, C.J., and HART, J., agree.